Supreme Court, U.S.
FILED
NOV 28 1988
JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
THELMA BATTLE, *et al.*,
Petitioners

v.

DISTRICT OF COLUMBIA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOUGLAS TAYLOR *
GROMFINE AND TAYLOR, P.C.
1101 15th Street, N.W.
Suite 1010
Washington, D.C. 20005
(202) 296-7420
Counsel for District of Columbia Nurses Association and all other Petitioners

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

I. Where individual plaintiffs in a Fair Labor Standards Act opt-in class action have designated their Union's counsel to represent them, is a Notice of Appeal filed by the Union sufficient to establish jurisdiction over the appeal under Rules 3 and 4 F.R.A.P.?

II. Where a Union represents the members of an FLSA, opt-in class action and others similarly situated in collective bargaining over subject matter affected by the action, may the Union appeal the trial courts decision that the members are exempt from coverage under FLSA?

PARTIES TO THE PROCEEDING BELOW

I. PLAINTIFFS/APPELLANTS

District of Columbia Nurses Association:

1. Dianne Ambuehl
2. Salvacion Aquino
3. Thelma Battle
4. Jeanette A. Blackman
5. Anna Blais
6. M. Jane Blais
7. Annettee W. Byrd
8. Mary Jane Canete
9. Doris B. Childress
10. Shirley Claggett
11. Katherine P. Coleman
12. Carolyn A.B. Curtis
13. Patricia C. Evans
14. Helen M. Ferris
15. Mable A. Goss
16. Verna C. Hill
17. Roberta Holborough
18. Barbara J. Lorsung
19. Maudine B. McFadden
20. Emma Miles
21. Lillian M. Moore
22. Rose M. Murray
23. Tazzie L. Onwubere
24. Beverly J. J. Freeman-Owen
25. Dorlinda M. Picolo
26. Patricia A. Powell
27. Gloria M. Rose
28. Yolanda D. Rowzie
29. Sandra K. Ruark
30. Christine S. Ruschmeyer
31. Jeanetta Shaw
32. Eldra Simmons

33. Julie A. Sonn
34. Barbara K. Spivey
35. Louise M. Vayda
36. Juanita K. Wagner
37. Mary Wilks
38. Rosa W. Williams
39. Pauline R. Yeargain

II. DEFENDANT/APPELLEE

District of Columbia

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION BELOW

DCNA, Thelma Battle, et al., v. District of Columbia, Ct. of App. No. 88-7074, August 30, 1988 is reported as: *Battle v. District of Columbia*, 854 F.2d 1448 (D.C. Cir., 1988).

JURISDICTIONAL STATEMENT

Jurisdiction for this Petition is based upon 28 U.S.C. Section 1254(1) and 28 U.S.C. Section 2106. The Opinion Appealed from was dated August 30, 1988.

STATUTES AND REGULATIONS INVOLVED

1. Fair Labor Standard Act, 29 U.S.C. 207(a)(1), 216(b).

2. Federal Rules of Appellate Procedure, Rules 3 and 4.

3. District of Columbia Code, §§ 1-618.16 and 17.

STATEMENT OF THE CASE

On June 18, 1987, the District of Columbia Nurses Association and nine individual Plaintiffs filed an action against their employer, the District of Columbia, under the Fair Labor Standards Act, 29 U.S.C. Section 201 *et seq.*, seeking injunctive relief, damages and attorneys' fees as provided by that Act. (A. 9-15) The individual plaintiffs were registered nurses employed by the District of Columbia in various capacities throughout the City-operated D.C. General Hospital, D.C. Public Schools, long-term care facilities and social services agencies. They were and are represented for purposes of collective bargaining by the District of Columbia Nurses Association, under the District's collective bargaining law for public employees, D.C. Code, §§ 1-618.16 and 17. The specific ground of the lawsuit was that the overtime payments earned by nurses are capped by City regulation at the maximum hourly pay for the District Pay Grade of DS 15, which was substantialy less than time and one-half as established by the maximum hours provision of FLSA, 29 U.S.C. § 207(a)(1).

Each named Plaintiff (three subsequent lists of claimants presented to the court brought the total to 39) executed the following "FLSA Claim Authorization" form:

> I am a Registered Nurse employed by the District of Columbia. I hereby authorize the law firm of Gromfine, Rosen and Taylor, P.C. (the "law firm"), counsel to the District of Columbia Nurses' Association, to represent me, in court, before agencies, or in arbitration, to obtain all benefits and compensation which I am entitled to receive because of the failure of the District of Columbia to comply with the Fair Labor Standards Act. The law firm is also authorized to seek reimbursement for attorneys' fees for

> effort by that firm on my behalf in actions in courts, agencies, or arbitration. I further authorize the law firm to negotiate on my behalf to settle my claim, subject to my final approval.

(A. pp. 20-21). Each signature was accompanied by the date, and the address and telephone number of each claimant.

The parties set forth at a status conference on September 23, 1987, a procedure for exchanging cross-motions and affidavits in an attempt to reach a posture for Summary Judgment. Plaintiffs and Defendants cross-filed on November 18. The District moved for dismissal of DCNA as a party, on grounds that an Association or Union was not entitled to enforce FLSA provisions on behalf of its members as a "representative party." In their reply to the District, the Plaintiffs simply moved to remove DCNA as a party to the matter, so as to streamline the litigation. This motion was made on November 30, 1987. The parties made further replies and submitted further affidavits. On December 10, the DCNA Motion to remove it as a party plaintiff was granted. After oral argument, Judge Revercomb ruled in favor of the District on the merits, holding that Registered Nurses employed by the District were professional employees, and therefore exempt from the maximum hours provisions of the Fair Labor Standards Act. His order was dated January 28, 1988 (A-3) and on February 26 Counsel for Plaintiffs filed the following Notice of Appeal:

> Notice is hereby given that the District of Columbia Nurses' Association, Plaintiff named above, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 28th day of January, 1988.

(A. 99). The appeal was thereafter docketed, and the respective parties filed docketing statements required by Local Rules. Plaintiffs/Appellants' docketing statement

was filed on March 29 and listed by name all individual Plaintiffs along with the specific issues being appealed. The city did not object to the content of the Notice of Appeal, and indicated its presumption that the Appeal was on behalf of all named Plaintiffs. (A. 100) However, the Circuit Court, *sua sponte*, ordered DCNA to show cause why the appeal should not be dismissed because it was filed by DCNA at a time when DCNA was no longer a party to the lawsuit. (A. 122) DCNA responded arguing that it was acting in a representative capacity when it appealed and had, until only weeks before final judgment, been a party to the lawsuit and thus entitled to appeal as an exception to the general rule that only parties may appeal. (A. 125-132) The Court of Appeals nevertheless dismissed the appeal, on grounds that it was compelled to do so as a result of the decision of this Court in the case of *Torres v. Oakland Scavenger Co.*, —— U.S. ———, 108 S. Ct. 2405 (1988). Plaintiffs now seek Certiorari of this Court to reinstate their appeal before the Court of Appeals for the District of Columbia Circuit.

ARGUMENT

The Notice of Appeal filed in this case was sufficient under the *Torres* decision to identify those appealing: all individual Plaintiffs. The role of the District of Columbia Nurses Association in this litigation and their interest in this dispute created sufficient grounds to allow DCNA to appeal on its own, although it was not formally a party to the litigation regardless of whether the Notice of Appeal was effective as to the individual Plaintiffs. Because the Court of Appeals failed to allow the appeal, it "departed from the accepted and usual course of judicial proceedings" and its opinion raised "an important question of federal law" which should be settled. In other ways, the opinion was "in conflict with applicable decisions by this court." All of these are reasons why, under Rule 17 of this Court, Certiorari should be granted.

I. The Notice of Appeal Was Adequate to Inform the Court and the Appellee of the Desire of All Appellants to Appeal.

The question under Rule 3 is whether the content of the Notice of Appeal was sufficient to render to the Court of Appeals jurisdiction over the dispute. In the case of *Torres*, *supra*, the Notice did not because Torres' name was omitted (albeit by error) while the names of all others were included. Here, by contrast, the name appearing on the Notice of Appeal was a generic one, the District of Columbia Nurses Association. Under the circumstances of this case, that was sufficient to inform all that all Plaintiffs were appealing.

The Plaintiffs were all members of the DNCA collective bargaining unit. They had from the beginning been part of the DCNA effort to resolve the question of their coverage under the Fair Labor Standards Act. Indeed, the authorization (or "opt-in" statements) filed by each Plaintiff specifically referred to their representative attorney as the "counsel to the District of Columbia Nurses Association." Although the idea of a representative plaintiff and class certification had been dropped from the litigation just before Summary Judgment, the Plaintiffs had acted in unison in all matters pertaining to the suit. The District, for example, had no difficulty understanding that the appeal was brought on behalf of all RN Plaintiffs: "The District of Columbia believes, therefore, that the appellants in this Court are the named individuals, but not the District of Columbia Nurses Association." (A. 100) The preliminary materials filed by DCNA likewise listed each and every Plaintiff as an appellant.

While the Court below has properly read *Torres* as reaffirming the jurisdictional character of the Notice of Appeal, it has misread the Torres opinion. The significant fact in that case was that Torres' own name was left off a list of appellants, thereby leading everyone to believe that he, by contrast with other Plaintiffs below,

had decided not to appeal. In this instant case, there was no such indication. The generic appeal by DCNA, whose counsel was specifically authorized to act on behalf of all Plaintiffs, gave no indication that the individual Plaintiffs were not part of the appeal. Indeed, knowing, as both the District of Columbia and the Court of Appeals did, that DCNA had withdrawn as a party, it was most reasonable to construe the Notice of Appeal as a general or all-inclusive one.

This issue here is not whether DCNA was a class representative, but whether the appearance of the words "Plaintiff, District of Columbia Nurses Association" was sufficient in the Notice of Appeal to alert all concerned that the DCNA members who had authorized DCNA to pursue the litigation intended to appeal. It was, and the Court of Appeals should have taken jurisdiction of the matter.

II. DCNA Is Qualified to Maintain an Appeal, Even Though No Longer a Party to the Lawsuit.

The District of Columbia Circuit is one of several which acknowledges that there are exceptions to the rule that only a party to a lawsuit may appeal, *United States v. LTV Corp.*, 746 F.2d 51 (1984):

> The first involved non-party appeals from consent judgments and other final judgments in shareholder's derivative suits and class action. *See, e.g., Tryforos v. Icarian Dev. Co.*, 518 F.2d 1258 (7th Cir. 1975), *cert. denied*, 423 U.S. 1091, 96 S. Ct. 887, 47 L. Ed. 2d 103 (1976); *Research Corp v. Asgrow Seed Co.*, 425 F. 2d 1059 (7th Cir. 1970); *Cohen v. Young*, 127 F. 2d 721 (6th Cir. 1042).
>
> * * * *
>
> The other set of cases Wheeling [putative appellant] relies upon involved collateral disputes which arose subsequent to the entry of an antitrust decree. *See e.g., United States v. ASCAP*, 442 F. 2d 601 (2d Cir. 1971) (appeal by non-party to original judgment from injunction against prosecution of col-

lateral challenge to original judgment); *United States v. United Fruit Co.*, 410 F. 2d 553 (5th Cir.) (appeal by non-party to original judgment from order sealing documents discovered in course of original proceedings), *cert. denied*, 396 U.S. 820, 90 S. Ct. 59, 24 L. Ed. 2d 71 (1969). The appellants in these cases were also effectively bound by the original judgment.

Finally, Wheeling cites *Matter of Penn Cent. Transp. Co.*, 596 F. 2d 1155 (3rd Cir.), *cert. denied*, 44 U.S. 835, 100 S. Ct. 68, 62 L. Ed. 2d 45 (1979).

* * * *

Fn. 5, p. 53. See also *Pelligrino v. Nesbit*, 203 F.2d 463 (9th Cir. 1953). However, the Court below failed to recognize the instant case as belonging to this group.

Even where a representative party, like a Union or Association, may not stand in place of individual claimants seeking to enforce the Fair Labor Standards Act, the Courts have acknowledged that such groups have a valid supervisory or coordinating role in such cases, which may even extend to acts encouraging members to file for FLSA benefits and to sign notices of their intent to "opt in" to ongoing litigation. *Arrington v. NBC*, 531 F. Supp. 498 (D.C., 1982). Thus, while DCNA may be unable to decide whether to appeal, it may very well have the capacity to communicate the desires of those it represents for collective bargaining purposes.

Not only does DCNA represent other RN's who will be affected, if not completely bound, by the court's decision, DCNA has interests of its own, separate from those of any individual, which will be affected by the failure to appeal. The collective bargaining agreement it negotiates with the City periodically, embraces several issues which are directly affected by a determination that the nurses are or are not exempt from coverage under FLSA. For example, the collective bargaining agreement establishes procedures for so-called "on-call" and "call-back" pay.

The money which nurses actually receive for such work during a week in which they already work a 40-hour tour of duty is directly determined by coverage of FLSA. If FLSA does not cover and a nurse who is "called back" to work gets only the contractual premium with no overtime, this changes dramatically the impact of the contract clause and the priorities of DCNA at the bargaining table. Similarly, if the FLSA maximum hours provision does not apply to City nurses, DCNA must attempt to secure an appropriate limitation at the bargaining table. The Agreement which provides for these and similar terms was before the Court of Appeals, and should have led it to conclude that DCNA was entitled to maintain an appeal apart from whether the Notice was adequate as to any individual nurses. In sum, DCNA was an active participant in the litigation before Judge Revercomb, having been dismissed as a party only a short time before the summary judgment which was appealed. It and the nurses it represents were severely affected by the lawsuit's outcome, not only by loss of the protective qualities of the Fair Labor Standards Act, but by an impact on the collective bargaining agreement which DCNA must negotiate and administer. For these reasons, DCNA should have been permitted to appeal despite the fact that it had not been a party to the lawsuit for a brief period prior to judgment. The statement of the majority opinion below that DCNA was a "stranger to the litigation" is simply contrary to fact.

CONCLUSION

For the foregoing reasons, the Court should grant a Writ of Certiorari to review the decision of the Court of Appeals for the District of Columbia Circuit dismissing the appeal.

Respectfully submitted,

DOUGLAS TAYLOR *
GROMFINE AND TAYLOR, P.C.
1101 15th Street, N.W.
Suite 1010
Washington, D.C. 20005
(202) 296-7420
Counsel for District of Columbia Nurses Association and all other Petitioners

* Counsel of Record

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STATUTORY APPENDIX

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 3. Appeal as of Right-How Taken.

(a) FILING THE NOTICE OF APPEAL. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6 respectively.

(b) JOINT OR CONSOLIDATED APPEALS. If two or more persons are entitled to appeal from a judgment or order of a district court and their interests are such as to make joinder practicable, they may file a joint notice of appeal, or may join in appeal after filing separate timely notices of appeal, and they may thereafter proceed on appeal as a single appellant. Appeals may be consolidated by order of the court of appeals upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) CONTENT OF THE NOTICE OF APPEAL. The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment, order or part thereof appealed from; and shall name the court to which the appeal is taken. Form 1 in the Appendix of Forms is a suggested form of a notice of appeal. An appeal shall not be dismissed for informality of form or title of the notice of appeal.

(d) SERVICE OF THE NOTICE OF APPEAL. The clerk of the district court shall serve notice of the filing

of a notice of appeal by mailing a copy thereof to counsel of record of each party other than the appellant, or, if a party is not represented by counsel, to the last know address of that party; and the clerk shall transmit forthwith a copy of the notice of appeal and of the docket entries to the clerk of the court of appeals named in the notice. When an appeal is taken by a defendant in a criminal case, the clerk shall also serve a copy of the notice of appeal upon the defendant, either by personal service or by mail addressed to the defendant. The clerk shall note on each copy served the date on which the notice of appeal was filed. Failure of the clerk to serve notice shall not affect the validity of the appeal. Service shall be sufficient notwithstanding the death of a party or the party's counsel. The clerk shall note in the docket the names of the parties to whom the clerk mails copies, with the date of mailing.

(e) PAYMENT OF FEES. Upon the filing of any separte or joint notice of appeal from the district court, the appellant shall pay to the clerk of the district court such fees as are established by statute, and also the docket fee prescribed by the Judicial Conference of the United States, the latter to be received by the clerk of the district court on behalf of the court of appeals.

Rule 4. Appeals as of Right-When Taken.

(a) APPEAL IN CIVIL CASES.

(1) In a civil case in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule 3 shall be filed with the clerk of the district court within 30 days after the date of the entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days after such entry. If a notice of appeal is mistakenly filed in the court of ap-

peals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.

(2) Except as provided in (a)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the day thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days after the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period last expires.

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment, or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the

court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this Rule 4(a) when it is entered in compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure.

(b) APPEALS IN CRIMINAL CASES. In a criminal case the notice of appeal by a defendant shall be filed in the district court within 10 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence or order but before entry of the judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion in arrest of judgment or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a judgment of conviction may be taken within 10 days after the entry of an order denying the motion. A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 10 days after entry of the judgment. When an appeal by the government is authorized by statute, the notice of appeal shall be filed in the district court within 30 days after the entry of the judgment or order appealed from. A judgment or order is entered within the meaning of this sub division when it is entered in the criminal docket. Upon a showing of excusable neglect the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

FAIR LABOR STANDARDS ACT

29 U.S.C. §§ 207(a)(1)

§ 207. Maximum hours

(a)(1) Except as otherwise provided in this section, no employer shall employ any of his employees who in any workweek is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unles such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one half times the regular rate at which he is employed; and

29 U.S.C. § 216(b)

(b) Any employer who violates the provisions of Section 206 or Section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation as the case may be and in an additional equal amount as liquidated damages. Any employer who violates the provisions of section 215(a)(3) of this title shall be liable for such legal or equitable relief as may be appropriate to effectuate the purposes of section 215(a)(3) of this title, including without limitation employment, reinstatement, promotion, and the payment of wages lost and an additional equal amount as liquidated damages. An action to recover the liability prescribed in either of the preceding sentences may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction by any one or more employee for and in behalf of himself or themselves and other employees similarly situated. No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought. The court in such action shall, in addition to any judgment awarded to the plaintiff or plain-

tiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action. The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under section 217 of this title in which (1) restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation, as the case may be owing to such employee under section 206 or section 207 of this title by an employer liable therefor under the provisions of this subsection or (2) legal or equitable relief is sought as a result of alleged violations of section 215(a)(3) of this title.

§ 1-618.16. Collective bargaining concerning compensation.

(a) The Board shall provide for collective bargaining concerning compensation under the procedures of and on the dates provided in § 1-618.17. The Mayor, the Board of Governors of the School of Law for its educational employees, the District of Columbia Board of Education for its educational employees and the Board of Trustees of the University of the District of Columbia for its education employees shall negotiate agreements regarding non compensation issues at the same time as compensation issues.

(b) The provisions of this section shall become effective on January 1, 1980, and shall apply to all employees, including employees described in § 1-602.4, of a particular occupational group who are represented by a labor organization which has been granted exclusive recognition under this chapter by the Board. The determination of an appropriate unit for the purpose of negotiations concerning compensation shall not require a request from a labor organization. In determining appropriate bargaining units for negotiations concerning compensation, the Board shall authorize broad units of occupational groups so as to minimize the number of different pay systems or schemes. The Board may authorize bargaining by multiple employer or employee groups as may be appropriate.

§ 1-618.17. Collective bargaining concerning compensation.

(a) Collective bargaining concerning compensation is authorized as provided in §§ 1-602.6 and 1-618.16. Such compensation bargaining shall preempt other provisions of this subchapter except as provided in this section. The principles of § 1-612.3 shall apply to compensation set under the provisions of this section.

(b) As provided in this section, the Mayor, the Board of Education, the Board of Trustees of the University of the District of Columbia, the Board of Governors of the School of Law, and each independent personnel authority, or any combination of the above (hereinafter referred to in this section as "management") shall meet with labor organization(s) (hereinafter referred to in this section as "labor") which has (have) been authorized to negotiate compensation at reasonable times in advance of the District's budget-making process to negotiate in good faith with respect to salary, wages, health benefits, within-grade increases, overtime pay, education pay, shift differential, premium pay, hours and any other compensation matters.

(c) Before the expiration of any existing negotiated agreement between the parties, the parties may agree to begin a thorough study of the compensation being paid to comparable occupational groups of employees in other jurisdictions in the Washington D.C. Standard Metropolitan Statistical Area and the nation's 30 largest cities by population. The annual study may include hours of work, health benefits and vacation time. The annual study may also include the current percentage change in the Consumer Price Index for the Washington Metropolitan Area published by the Bureau of Labor Statistics, United States Department of Labor.

(d) Repealed.

(e)(1) If the parties choose to conduct an annual study pursuant to subsection (c) of this section, the results of the annual study shall be made public and shall be available to the parties involved in negotiations for such use as they may mutually agree upon.

(2) The results of the annual study may be updated at any time by any party to the negotiation. Such updates shall constitute supplements to the annual study and shall be made public and utilized in the same

manner as the annual study pursuant to paragraph (1) of this subseciton.

(f) (1) Negotiations among the parties to existing contracts shall commence no later than 90 days before the expiration of the existing contracts. The failure of any party to begin negotiations by 90 days before the expiration of existing contracts, without the express written consent of all parties, shall constitute an automatic impasse. Any party may notify the Executive Director of the Public Employee Relations Board in writing of this automatic impasse. The Executive Director shall assist in the resolution of this automatic impasse by selecting an impartial person experienced in public sector disputes to serve as a mediator. If the mediator does not resolve the automatic impasse within 30 days, or any shorter period designed by the mediator, the Executive Director shall then appoint an impartial Board of Arbitration to investigate the labor-management issues involved in the dispute, conduct whatever hearings it deems necessary, and issue a written award to the parties with the object of achieving a prompt and fair settlement of the dispute. The award shall be issued within 20 days after the Board has been established. The award shall contain findings of fact and a statement of reasons. The award shall be final and binding upon the parties in the dispute.

(2) Negotiations shall continue among the parties until a settlement is reached or until 180 days after negotiations have commenced. If the parties have failed to reach settlement on any issues by the 180th day, then an automatic impasse may be declared by any party. The declaring party shall promptly notify the Executive Director of the Public Employee Relations Board in writing of an impasse. The Executive Director shall assist in the resolution of this declared automatic impasse by selecting an impartial person experienced in public sector disputes to serve as a mediator. If the mediator does

not resolve the declared automatic impasse within 30 days, or any shorter period designated by the mediator, or before the automatic impasse date, the Executive Director, upon the request of any party, shall appoint an impartial Board of Arbitration to investigate the labor-management issues involved in the dispute, conduct whatever hearing it deems necessary, and issue a written award to the parties with the object of achieving a prompt and fair settlement of the dispute. The last best offer of each party shall be the basis for such automatic impasse arbitration. The award shall be issued within 20 days after the Board has been established. The award shall contain findings of fact and a statement of reasons. The award shall be final and binding upon the parties to the dispute.

(3) If the parties reach an impasse on any issues in negotiations before the declared automatic impasse date, any party shall promptly notify the Executive Director of the Public Employee Relations Board in writing. The Executive Director shall assist in the resolution of this impasse by selecting an impartial person experienced in public sector disputes to serve as a mediator. If the mediator does not resolve the impasse within 30 days, or any shorter period designated by the mediator, or before the automatic impasse date, the Executive Director, upon the request of any party, shall appoint an impartial Board of Arbitration to investigate the labor-management issues involved in the dispute, conduct whatever hearing it deems necessary and issue a written award to the parties with the object of achieving a prompt and fair settlement of the dispute. The last best offer of each party shall be the basis for this impasse arbitration. The award shall be issued within 20 days after the Board has been established. The award shall contain findings of fact and a statement of reasons. The award shall be final and binding upon the parties to the dispute.

(4) If the procedures set forth in paragraph (1), (2) or (3) of this subsection are implemented, no change in the status quo shall be made pending the completion of mediation and arbitration, or both.

(5) The fact finder, mediator and any members of the Board of Arbitration appointed by the Executive Director of the Public Employee Relations Board shall be entitled to compensation at the maximum daily rate allowable by law for each day they are actually engaged in performing services under this section. Compensation for arbitration shall be divided equally and paid one-half by management and one-half by labor; compensation for mediation and fact-finding shall be paid by the moving party, or shared if by mutual request.

(g) Multi-year compensation agreements are encouraged. No compensation agreement shall be for a period of less than 3 years. When multi-year agreements are negotiated, the annual negotiations for the years in which a new contract is not being negotiated shall be suspended.

(h) Compensation negotiations pursuant to this section shall be confidential among the parties: Provided, however, that the Council may appoint observers from its membership and staff, or both, to the negotiations. Such Council observers will be responsible for informing the members of the Council of the progress of negotiations. All information concerning negotiations shall be considered confidential until impasse or settlement.

(i) Any settlement agreed to before September 15th of any year(s), including an arbitrator's award, shall be included in the Mayor's budget request in mid-September. Any other settlement shall be included in a supplemental budget request submitted by the Mayor. The Mayor shall fully support the passage of such settlement by every reasonable means before all legislative bodies

provided that the Mayor shall not be required to support an arbitrator's award.

(j) Within 60 days after the parties have reached agreement or a board of arbitration has issued its award, the management shall transmit the settlement to the Council for its review. If the management fails to transmit the settlement to the Council within the 60-day period, it shall be deemed to be submitted on the 61st day. Within the 60-day review period in this subsection, the Council may accept or reject, by resolution, a settlement. All labor relations settlements negotiated or otherwise determined pursuant to this section shall become effective by their terms, unless the Council rejects the settlement by a two-thirds vote of its members within 60 calendar days of its submission by the Mayor. The 60 calendar days for Council review shall not include days that pass during a recess of the Council. If the Council rejects a settlement with a two-thirds vote of its members, then the settlement shall be returned to the parties for renegotiation, with specific reasons for the rejection appended to the document disclosing the rejection of the settlement.

(k) Any settlement, including an arbitrator's award, shall be included in either the District budget request or in any supplemental budget request and shall be fully supported by the District by every reasonable means before Congressional bodies.

(l) Notwithstanding any provisions of subchapters XXII, XXIII, or XXVII of this chapter to the contrary, the health, life and retirement programs authorized by these subchapters are proper subjects of collective bargaining under this section.

(m) When the Public Employee Relations Board ("Board") is required to determine an appropriate bargaining unit for the purpose of compensation negotiations pursuant to § 1-618.16, negotiations for compensa-

tion between management and the exclusive representative of the appropriate bargaining unit shall begin no later than 90 days after the Board's determination. The timetable for the conduct and conclusion of such negotiations shall be that provided for in subsection (f) of this section. The Mayor shall negotiate agreements concerning working conditions at the same time as he or she negotiates compensation issues.

88-1791

Supreme Court, U.S.
FILED
NOV 28 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
THELMA BATTLE, *et al.*,
Petitioners

v.

DISTRICT OF COLUMBIA,
Respondent

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOUGLAS TAYLOR *
GROMFINE AND TAYLOR, P.C.
1101 15th Street, N.W.
Suite 1010
Washington, D.C. 20005
(202) 296-7420
Counsel for District of Columbia Nurses Association and all other Petitioners

* Counsel of Record

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APPENDIX

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Filed August 30, 1988

No. 88-7074

DISTRICT OF COLUMBIA NURSES' ASSOCIATION, THELMA BATTLE, *et al.*,

v.

DISTRICT OF COLUMBIA,

Appeal from the United States District Court for the District of Columbia

(Civil Action No. 87-01675)

On Responses to Order to Show Cause

Douglas Taylor for appellant.

Frederick D. Cooke, Jr., Corporation Counsel, *Charles L. Reischel*, Deputy Corporation Counsel, and *Susan S. McDonald*, Assistant Corporation Counsel, for appellee.

Before MIKVA, BUCKLEY, and D.H. GINSBURG, *Circuit Judges.*

Opinion PER CURIAM.

Concurring statement filed by *Circuit Judge* MIKVA.

PER CURIAM: Appellant District of Columbia Nurses' Association ("D.C.N.A.") noted this purported appeal from an order entered by the district court granting the District of Columbia's motion for summary judgment and denying the motion for summary judgment filed by individual plaintiffs. Concern about our jurisdiction prompted the court to issue an order for the parties to show cause as to why the appeal should not be dismissed for lack of jurisdiction. The District of Columbia responded with a short memorandum urging dismissal. D.C.N.A. responded with a motion to allow appeal and redesignate appellants. We deny D.C.N.A.'s motion and dismiss the appeal.

D.C.N.A. and several nurses who are D.C.N.A. members commenced this action in the district court to challenge the failure of the District of Columbia to pay its nurses overtime at the rate of time-and-a-half as they contend is required by the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 207(a)(1) (1982). D.C.N.A. and the individual nurses are represented by the same counsel.

The District of Columbia moved for summary judgment, claiming, *inter alia*, that D.C.N.A. lacks standing under the FLSA. In response to this claim, the plaintiffs filed a motion to amend their complaint to remove D.C.N.A as a party and designate one of the individual nurses as lead plaintiff. The district court granted the motion, and the Clerk filed the amended complaint in which D.C.N.A. was no longer listed as a plaintiff.

Several weeks later, the district court granted the District of Columbia's motion for summary judgment. D.C.N.A. filed a notice of appeal captioned "The District of Columbia Nurses' Association, *et al.*, Plaintiffs," stating that "[n]otice is hereby given that [D.C.N.A.], Plaintiff named above, hereby appeals to [this court] from the final judgment entered in this action on the 28th day of January, 1988." This court entered an order

to show cause why the appeal should not be dismissed since the purported appellant was no longer a plaintiff at the time of the judgment and no remaining plaintiff had been identified as an appellant. *See Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988) (court of appeals only has jurisdiction over appeals of parties identified in notice of appeals); *United States v. LTV Corp.*, 746 F.2d 51, 53 (D.C. Cir. 1984) (only party to district court action may note an appeal).

In response to our order to show cause, D.C.N.A. raises several arguments that it claims establish the court's jurisdiction over this appeal, none of which is persuasive. First, it asserts that D.C.N.A. "appeared to be considered a party by the court below" and that "it was not clear that D.C.N.A. was no longer a party" because its name continued to appear in the caption on papers prepared by the district court after the court granted the motion to amend. Appellant's Memorandum in Support of Motion to Allow Appeal and Redesignate All Plaintiffs as Appellants ("Appellant's Memorandum") at 2.

D.C.N.A. removed itself from the case on its own motion. In the mind of D.C.N.A.'s counsel, D.C.N.A was no longer a party until this court questioned its jurisdiction over this appeal. *See* Certificate of Counsel Pursuant to General Rule 11(a)(1) filed March 30, 1988 ("Originally, the [D.C.N.A.] was a party to this action, but was removed by order of the Court"). Furthermore, it is clear that the district court considered D.C.N.A. no longer to be a party because it describes plaintiffs as "registered nurses" with no mention of an organization. Memorandum filed January 28, 1988 at 1. Given these circumstances, D.C.N.A.'s assertion that it was still a party to the district court proceedings after that court granted the motion to amend rings false indeed.

D.C.N.A. also claims that even if it is no longer a party, it has standing to appeal. D.C.N.A. misreads

United States v. LTV Corp., 746 F.2d 51 (D.C. Cir. 1984), when it claims that in order to appeal, all that is necessary is that "[a]n appellant . . . be 'privy to the record' below and . . . be aggrieved by the order appealed from." Appellant's Memorandum at 4. This court clearly stated that "the general rule [is] that an appellant must be a party to the proceedings in order to file an appeal." *Id.* at 53. Although we recognized that there are certain exceptions to the general rule that an appellant must be a party, *id.* at 53 n.5, none is applicable here.

D.C.N.A.'s reliance on *Adams v. Morton*, 581 F.2d 1314 (9th Cir. 1978), *cert. denied*, 440 U.S. 958 (1979), is equally misplaced. In *Adams*, the appellant filed objections to a motion for summary judgment in the district court but did not file a motion to intervene. "The [district] court properly viewed appellant's objections as a formal entry into the case, and decided the merits of the motion as if appellant had participated in every stage of the proceedings. . . . [A]ppellant's counsel . . . conceded that his client should be treated as an intervenor." *Id.* at 1318. In this case, on the other hand, D.C.N.A. *removed* itself from the case *after* participating in the earlier stages. Accordingly, it cannot successfully argue that it is still a party because it participated below.

D.C.N.A. also asserts that because of the congruity of interests among D.C.N.A. and the individual nurses ("Thelma Battle, *et al.*"), the appeal by D.C.N.A. should be considered an appeal by the individual nurses. D.C.N.A. argues that if the body of the notice of appeal had read "District of Columbia Nurses Association, *et al.*," rather than simply "District of Columbia Nurses' Association," the individual nurses would have been permitted as appellants. Based on this claim, the Association moves this court for an order designating the nurses as appellants.

In support of its motion, D.C.N.A. relies on two opinions of the Fifth Circuit: *Ayers v. Sears, Roebuck & Co.*, 789 F.2d 1173 (5th Cir. 1986), and *Parrish v. Board of Comm'rs of Alabama State Bar*, 505 F.2d 12 (5th Cir. 1974), *opinion withdrawn on other grounds*, 509 F.2d 540, *reh'g en banc*, 524 F.2d 98 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), *appeal after remand*, 533 F.2d 942 (5th Cir. 1976). In those two cases, the Fifth Circuit followed "a less strict application of [Fed. R. App. P. 3(c)], permitting, in limited instances, appeals by parties not named in the notice of appeal." *Ayers*, 789 F.2d at 1177. Inexplicably, D.C.N.A. does not discuss *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988), cited in this court's order to show cause.

Torres was one of a number of plaintiffs who, after receiving notice of a proposed settlement agreement, intervened in an employment discrimination suit against Oakland Scavenger. The complaint in intervention was dismissed and the plaintiffs appealed, but Torres' name was inadvertently omitted from the notice of appeal. The Ninth Circuit reversed and remanded the case.

On remand, the district court applied Rule 3(c) strictly and held that Torres had failed to appeal the original judgment; therefore, the judgment was final as to him. The Ninth Circuit affirmed. The Supreme Court granted certiorari to resolve a conflict in the circuits, identifying *Ayers* as one of the cases following the contrary rule. *Id.* at 2407 & n.1. The Court rejected the more liberal application of Rule 3(c) used by the Fifth Circuit in *Ayers*, and held that parties taking an appeal must be named or otherwise identified in the notice of appeal. The court of appeals does not have jurisdiction over an appeal by a purported appellant not identified in the notice. *Id.* at 2409.

The Court explicitly rejected the argument that use of the term "*et al.*" sufficiently identifies a party as an ap-

pellant, stating that the term utterly fails "to provide notice both to the opposition and to the court of the identity of the appellant or appellants." *Id.* While the Court left open the possibility of amendment of the notice within the time limits set by Rule 4, the motion to amend to include the individual nurses is untimely. *See* Fed. R. App. P. 4(a)(5).

Relying on *Chathas v. Smith*, 848 F.2d 93 (7th Cir. 1988), D.C.N.A. argues that this court has power to include the nurses in the appeal pursuant to the All Writs Act, 28 U.S.C. § 1651. In *Chathas*, the question presented to the court was whether failure to identify a particular *appellee* in a notice of appeal would be fatal to the appeal against that appellee. The court held that since omission of the name did not mislead the putative appellee, the omission was harmless error and amendment of the notice was unnecessary. The court also stated that in appropriate situations, the All Writs Act could provide the power to amend the notice to identify an appellee.

While Rule 3(c) requires that appellants be identified it does not require that appellees be identified; therefore, when an appellee is not identified, as in *Chathas*, the court has jurisdiction over the appeal, and the issuance of a writ adding a party below as an appellee would be "in aid of [that] . . . jurisdiction[]." 28 U.S.C. § 1651(a). When a purported *appellant* is not identified, however, the court has no jurisdiction of the appeal. *Torres*, 108 S. Ct. at 2409. An order of this court granting status as appellants to the individual nurses would have the effect of *creating* jurisdiction in this court when the court does not have jurisdiction, a power not granted by the All Writs Act. *M'Clung v. Silliman*, 19 U.S. 598 (1821); *Telecommunications Research & Action Center v. FCC*, 750 F.2d 70, 76 (D.C. Cir. 1984). Therefore, we do not have the power to "redesignate" the nurses as appellants.

This appeal was noted by a former plaintiff that had become a stranger to the litigation. No remaining plaintiff noted an appeal, and this court does not have the power to grant status as appellants to those remaining plaintiffs based on the use of the term "et al." in the notice of appeal or the relationship between the remaining plaintiffs and the former plaintiff that noted the appeal. Consequently, we deny the motion to allow appeal and redesignate appellants, and dismiss the appeal for lack of jurisdiction.

So ordered.

MIKVA, *Circuit Judge, concurring*: I write separately to underscore the particularly harsh result that follows from today's decision in this case. I agree the result is compelled by the Supreme Court's recent interpretation of Federal Rule of Appellate Procedure 3(c) in *Torres v. Oakland Scavenger Co.*, 108 S. Ct. 2405 (1988); the case uniquely illustrates how tough the rule can be.

Plaintiffs' appeal on the merits of their case will not be heard simply because their notice of appeal failed to specify all their names—even though there has been no surprise, detrimental reliance, or undue prejudice to the appellee. I cannot believe this result is consistent with the intent of the Federal Rules to "secure the just, speedy, and inexpensive determination of every action." Fed. R. Civ. P. 1. It would appear that we are back to the bad old days of the snares and tricks that would befall an inartful pleader at the common law. The advent of the Federal Rules of Civil Procedure, as the title implies, was supposed to civilize the process and look to fairness rather than technicalities.

Unless and until Congress or the Supreme Court decrees otherwise, we must deny these litigants their right to appeal. I reluctantly concur.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 87-1675

DISTRICT OF COLUMBIA NURSES' ASSOCIATION, *et al.*,
Plaintiffs,

v.

DISTRICT OF COLUMBIA,
Defendant.

JUDGMENT ORDER

In accordance with the Memorandum entered this 28th day of January, 1988, judgment is entered for the defendant.

GEORGE H. REVERCOMB
Judge

Date

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 87-1675 GHR

THE DISTRICT OF COLUMBIA NURSES' ASSOCIATION, *et al.*,
Plaintiffs,

vs.

THE DISTRICT OF COLUMBIA,
Defendant.

NOTICE OF APPEAL

Notice is hereby given that The District of Columbia Nurses' Association, Plaintiff named above, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the final judgment entered in this action on the 28th day of January, 1988.

Respectfully Submitted,

February 26, 1988

DOUGLAS TAYLOR
D.C. Bar No. 959502
GROMFINE AND TAYLOR, P.C.
1101 15th Street, N.W.
Suite 1010
Washington, D.C. 20005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7074

DISTRICT OF COLUMBIA NURSES' ASSOCIATION,
Appellant,

v.

DISTRICT OF COLUMBIA,
Appellee.

CERTIFICATE AS TO PARTIES, RULING AND RELATED CASES

A. *Parties and Amici.* The District of Columiba was the defendant below and is appellee in this Court. The plaintiffs below were originally the District of Columbia Nurses' Association, Thelma Battle, M. Jane Blais, Doris B. Childress, Shirley Clagett, Beverly J. Freeman-Owen, Maudine B. McFadden, Yolanda D. Rowzie, Juanita K. Wagner and Mary Wilks. On July 14, and August 14, 1987 the district court granted the plaintiffs' motion to name additional claimants. The list of additional claimants are attached to this certificate as Attachment A.

On December 10, 1987, the district court granted the plaintiffs' motion (filed November 30, 1987) to amend their complaint by removing the District of Columbia Nurses' Association as a party plaintiff and naming Beverly Freeman-Owen as the "lead" plaintiff. The amended complaint named as plaintiffs the same plaintiffs named in the original complaint, except the District of Columbia Nurses Association. The District of Columbia believes, therefore, that the appellants in this court are the named individuals, but more the District of Columbia Nurses' Association.

B. *Rulings Under Review.* This appeal is from the unreported January 28, 1988 judgment order and memorandum opinion of the United States District Court for the District of Columbia (George H. Revercomb, J.) granting defendant District of Columbia's motion for summary judgment, denying the plaintiffs' motion for summary judgment, and dismissing the action.

C. *Related cases.* This case has not previously been before this Court or any other court, except the court below. Counsel is not aware of any other related pending cases in this Court or in any other court.

Respectfully Submitted,

FREDERICK D. COOKE, JR.
Corporation Counsel

CHARLES L. REISCHEL
Deputy Corporation Counsel
Appellate Division

SUSAN S. MCDONALD
Assistant Corporation Counsel

Office of the Corporation Counsel
Room 305, District Building
Washington, D.C. 20004

Tel.: (202) 727-6252

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 88-7074

THELMA BATTLE, *et al.*

vs.

THE DISTRICT OF COLUMBIA

STATEMENT OF ISSUES TO BE RAISED ON APPEAL

Appellants Thelma Battle et. al., present the following issues on appeal.

1. Did the District Judge correctly find that Registered Nurses employed by the District of Columbia are exempt from the maximum hours provision of the Fair Labor Standards Act, 29 U.S.C. Section 207(b)(1) and regulations promulgated thereunder?

2. If so, was it proper to dismiss the entire cause of action in face of uncontradicted evidence that at least some of the Plaintiffs spend more than 20% of their work time engaged in non-professional tasks?

Respectfully Submitted,
Attorney for Appellants

DOUGLAS TAYLOR
THE LABOR BUREAU, INC.
1101 15th Street, N.W., Suite 1010
Washington, D.C. 20005
(202) 296-7420

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Appeal No. 88-7074

THELMA BATTLE, *et al.*

vs.

THE DISTRICT OF COLUMBIA

CERTIFICATE OF COUNSEL
PURSUANT TO GENERAL RULE 11(a)(1)

The following includes all Plaintiff/Appellants in the instant matter:

1. Dianne Ambuehl
2. Salvacion Aquino
3. Thelma Battle
4. Jeanette A. Blackman
5. Anna Blais
6. Jane Blais
7. Annette W. Byrd
8. Mary Jane Canete
9. Doris B. Childress
10. Shirley Claggett
11. Katherine P. Coleman
12. Carolyn A.B. Curtis
13. Patricia C. Evans
14. Helen M. Ferris
15. Mable A. Goss
16. Verna C. Hill
17. Roberta Holborough
18. Barbara J. Lorsung
19. Maudine B. McFadden
20. Emma Miles
21. Lillian W. Moore
22. Rose M. Murray
23. Tazzie L. Onwubere
24. Beverly Freeman-Owen
25. Dorinda M. Picolo
26. Patricia A. Powell
27. Gloria M. Rose
28. Yolanda D. Rowzie
29. Sandra K. Ruark
30. Christine S. Ruschmeyer
31. Jeanetta Shaw
32. Eldra Simmons
33. Julie A. Sonn
34. Barbara K. Spivey
35. Louise M. Vayda
36. Juanita K. Wagner
37. Mary Wilks
38. Rosa W. Williams
39. Pauline R. Yeargain

Originally, the District of Columbia Nurses' Association was a party in this action, but was removed by order of the Court. The sole Defendant is the District of Columbia.

Respectfully Submitted,
Counsel for Appellants

DOUGLAS TAYLOR
THE LABOR BUREAU, INC.
1101 15th Street, N.W.
Suite 1010
Washington, D.C. 20005
(202) 296-7420

UNITED STATES COURTS OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7074

ENTRY OF APPEARANCE

CAPTION

THELMA BATTLE, *et al.*

v.

DISTRICT OF COLUMBIA

PARTY

The Clerk will enter my appearance as counsel for:

— Appellant(s)

— Petitioner(s) Thelma Battle, and all others
Name of Party

* * * *

Attorney

Name Douglas Taylor

Phone (202) 296-7420

Firm Gromfine and Taylor

Address 1101 15th Street, N.W., Suite 1010
Washington, D.C. 20005

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

DOCKETING STATEMENT

All Cases Other than Administrative Agency Cases
(To be completed by appellant/petitioner)

1. CASE NO. 88-7074
2. DATE DOCKETED MARCH 21, 1988
3. CASE NAME

   (lead parties only) Thelma Battle, et al., v. District of Columbia
4. TYPE OF CASE: ☒ District Ct—☒ US Civil —— Private —— Civil —— Criminal —— Bankruptcy —— Bankruptcy if direct from Bankruptcy Court —— Original proceeding ——
5. IS THIS CASE REQUIRED BY STATUTE TO BE EXPEDITED?

   YES —— NO ☒

   IF YES, cite statute: _____
6. CASE INFORMATION:

   a. District Court Docket No.

      Civil Action 87-1675 GHR

      Criminal _____

      Miscellaneous _____

      Bankruptcy Court Docket No. _____

      Bankruptcy _____

      Adversary _____

      Ancillary _____

      Tax Court Docket No.

      Tax _____

b. Review is sought of: ☒ Final Order
——Interlocutory Order

appealable as of right
——Interlocutory Order certified for appeal

c. Name of judge who entered order being appealed: Judge George H. Revercomb Magistrate ————

d. Date of order(s) appealed (use date docketed) January 28, 1988

e. Date notice of appeal filed: February 26, 1988

f. Has any other notice of appeal been filed in this case?

Yes —— No ☒

IF YES, give date filed: ————————

g. Are any motions currently pending in trial court?

Yes —— No ☒ IF YES, identify motion and date filed: ————————

h. Has a transcript of proceedings been ordered pursuant to FRAP 10(b)?

Yes —— No ☒ If NO, why not? none required

i. Has this case previously been before this Court under another appeal number?

Yes —— No ☒ IF YES, give appeal number(s): ————

j. Are any cases involving the same underlying order or, to counsel's knowledge involving substantially the same issues, currently pending before the District Court, this Court or the Supreme Court?

Yes Yes —— No ☒ IF YES, give docket number(s) of these cases: ————

k. Does this case turn on the validity of correct interpretation or application of a particular statute? Yes —— No —— IF YES, give popular name and citation of statute: Standards Act, 29 U.S.C. Section 207(a)(1)

Signature ———————————— Date ————

Name of Counsel or Pro Se Litigant (Print) Douglas Taylor

Firm Gromfine and Taylor Phone (202) 296-7420

Address 1101 15th Street, N.W. Suite 1010 Washington D.C. 20005

Counsel for Appellant (Name of Party) Thelma Battle et. al.,

ATTACH CERTIFICATE OF SERVICE

Note: If counsel for any other party believes that the information submitted is inaccurate or incomplete, counsel may so advise the Clerk within 10 days by letter, with copies to all other parties specifically referring to the challenged statement. An original and three copies of such letter should be submitted.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1987

CA 87-01675

No. 88-7074

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
THELMA BATTLE, *et al.*,
Appellant,

v.

DISTRICT OF COLUMBIA CORPORATION COUNSEL

BEFORE: Buckley and D.H. Ginsburg, Circuit Judges

ORDER TO SHOW CAUSE

Upon noting that the notice of appeal in this case was filed by The District of Columbia Nurses' Association and further noting that the district court dismissed District of Columbia Nurses' Association as a party on the Association's motion, it is

ordered by the court on its own motion that the parties show cause within twenty-one days of the date of this order why this appeal should not be dismissed. *See Torres v. Oakland Scavenger Co.*, 56 USLW 4740 (June 24, 1988) (court of appeals only has jurisdiction over appeals of parties named in notice of appeal); *United States v. LTV Corp.*, 746 F. 2d 51, 53 (D.C. Cir. 1984) (only party to district court action may note an appeal).

The clerk is directed to send copies of this order to the parties by certified mail, return receipt request.

Per Curiam

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 88-7074

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
THELMA BATTLE, *et al.*,
Appellant,

v.

DISTRICT OF COLUMBIA CORPORATION COUNSEL,
Appellee.

RESPONSE TO ORDER TO SHOW CAUSE

In response to the Court's July 6, 1988 order to show cause why the appeal should not be dismissed, the District of Columbia states that the appeal should be dismissed.

As the Court observed, the District of Columbia Nurses' Association was dismissed as a party in the district court, on its own motion. The notice of appeal in this case was filed by the District of Columbia Nurses' Association. Thus, no party to the action below has filed a notice of appeal, and this Court lacks jurisdiction to hear the appeal. *Torres v. Oakland Scavenger Co.*, —— U.S. ——, 56 USLW 4740 (June 24, 1988) (court lacks jurisdiction over claim of party not named in notice of appeal); *United States v. LTV Corp.*, 746 F. 2d 51, 53 (D.C. Cir. 1984) (only a party below may note an ap-

peal). Accordingly, the appeal in this case should be dismissed.

Respectfully Submitted,

FREDERICK D. COOKE, JR.
Corporation Counsel, D.C.
CHARLES L. REISCHEL

Deputy Corporation Counsel, D.C.
Appellate Division

SUSAN S. MCDONALD
Assistant Corporation Counsel, D.C.

Attorneys for District of Columbia
District Building, Room 305
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004
Telephone: 727-6252

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing response to order to show cause was mailed, postage prepaid, this 19th day of July 1988, to Douglas Taylor, Esquire, I.J. Gromfine, Esquire, 1101 15th Street, N.W., Suite 1010, Washington, D.C. 20005.

SUSAN S. MCDONALD
Assistant Corporation Counsel, D.C.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

C.A. No. 87-01675

DISTRICT OF COLUMBIA NURSES ASSOCIATION,
THELMA BATTLE, *et al.*,
Appellant,

v.

DISTRICT OF COLUMBIA,
Appellee.

MOTION TO ALLOW APPEAL AND REDESIGNATE APPELLANTS

The court has, *sua sponte*, ordered the parties to show cause why this appeal should not be dismissed. It should not, and Plaintiffs below, Thelma Battle, et al., should be designated as Appellants for the following reasons.

1. It was unclear that the District of Columbia Nurses Association ("D.C.N.A.") was not a party below. The D.C.N.A. Motion to Amend its complaint and Amended Complaint included several changes, including a removal of D.C.N.A. as a party. However, when the court granted that motion, it did so generally and DCNA remained a part of the case caption, on all subsequent documents, including the Memorandum and Order of the Court from which thus appeal is taken (Order granting Plaintiff's Motion and subsequent Memorandum and Order are Attachments 1, 2, and 3 respectively).

2. The Notice of Appeal, though filed in the name of D.C.N.A. only expressed the intent of all Plaintiffs.

All individual named Plaintiffs are *both* members of D.C.N.A. and represented by it in employment matters, and clients, with D.C.N.A., of Counsel for Plaintiffs.

3. D.C.N.A. represents for purposes of collective bargaining over pay matters (including overtime, the subject of this lawsuit), all registered nurses employed by the District of Columbia including many who are not named parties in this action. At one time D.C.N.A sought "representative" status in instant matter and was a named party until shortly before the final judgment. D.C.N.A., then, meets the strictures of several exceptions to the general rule that only named parties may appeal, see *U.S. v. LTV Corp.*, 746 F. 2d 51 (D.C. Cir. 1984) at 53, fn. 5 and Moores Federal Practice 203.06.

For all of the foregoing reason, the Appeal should be allowed, and the names of individuals claimants/Plaintiffs, *Thelma Battle*, et al., adopted as appellants.

Respectfully Submitted,

Counsel for the District of
Columbia Nurses Association
Plaintiffs Thelma Battle, et al.,

July 22, 1988

DOUGLAS TAYLOR
GROMFINE AND TAYLOR, P.C.
1101 15th Street, N.W.
Suite 1010
Washington, D.C. 20005
(202) 296-7420

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APPELLANT'S MEMORANDUM IN SUPPORT OF MOTION TO ALLOW APPEAL AND REDESIGNATE ALL PLAINTIFFS AS APPELLANTS

PERTINENT FACTS

This action was originally filed in June, 1987, by D.C.N.A. and nine other named plaintiffs to enforce overtime provisions of the Fair Labor Standards Act, 29 U.S.C. § 201, et seq. D.C.N.A. sought status as "class representative" of all registered nurses employed by the District of Columbia. With all other Plaintiffs, D.C.N.A. moved for summary judgment on November 16, 1987. On that same date, the District Corporation Counsel also moved for summary judgment on grounds, *inter alia* that D.C.N.A. lacked standing as a class representative. In response, D.C.N.A. moved to amend its complaint to remove any questions relating to "class action" under the Fair Labor Standards Act, 29 U.S.C. § 201 *et seq.* and the status of D.C.N.A., so as to permit the court to address the merits of the dispute directly.

D.C.N.A.'s Motion to Amend was granted generally December 10, (Attachment 1) but the caption of the case was never changed. Counsel for D.C.N.A. (also Counsel for other Plaintiffs) argued in favor of summary judgment. The only documents entered into the record below prior to appeal and after granting D.C.N.A.'s Motion to Amend were the Judgment and Memorandum of the District Court. (Attachments 2 and 3)

I. DISTRICT OF COLUMBIA NURSES ASSOCIATION APPEARED TO BE CONSIDERED A PARTY BY THE COURT BELOW.

The Complaint was amended in this case to remove all aspects of a "class action" and to remove D.C.N.A. as a party. Although the Motion to Amend was granted, it was not clear that D.C.N.A. was no longer a party. The main indication to the contrary was that on all subsequent documents, including the Court's own judgment and Memorandum, D.C.N.A.'s name appeared as a "party."

II. IN FILING APPEAL, THE DISTRICT OF COLUMBIA NURSES ASSOCIATION SPOKE FOR AND ON BEHALF OF THE OTHER NAMED PLAINTIFFS, ITS MEMBERS.

The congruity of interests among D.C.N.A. and the other named plaintiffs is apparent. D.C.N.A. has a clear interest in assuring that its members receive full pay for their overtime work, and that the salutary effect of FLSA, to help assure that a sufficient number of nurses are hired, is enhanced. When overtime is paid under law, the total compensation of nurses is improved—a central goal of D.C.N.A. as collective bargaining representative. Even though D.C.N.A. was not technically a class representative, its appeal through the legal counsel it shared with plaintiffs, may be considered an expression of *their* intent to appeal as well. Parties were referred to throughout this litigation as "D.C.N.A. et al.,." Had the

Notice of Appeal read "D.C.N.A., et al., instead of "D.C.N.A.," the other plaintiffs would have been permitted as appellants, see *Ayer v. Sears, Roebuck*, 789 F. 2d 1173 and *Parrison v. Board of Covers of Alabama State Bar*, 505 F. 2d 12 (5th Cir., 1974) withdrawn on other grounds, 509 F. 2d 540 (1975). To preclude this appeal because of the absence of "et al." would be to exalt form over intention. There is no substantial harm of prejudice in allowing Plaintiffs to add "et al." to the Notice of Appeal at this date. As the Seventh Circuit recently made clear, authority to allow this change may be found in the All Writs Act, 28 U.S.C. 1651, *Chathas v. Smith*, 848 F. 2d 93, 56 USLW 2710 (7th Cir. 1988) (Attachment 4 hereto).

III. DISTRICT OF COLUMBIA NURSES ASSOCIATION HAD STANDING TO APPEAL APART FROM THAT OF A PARTY.

As the court made clear in *U.S. v. LTV Corp.*, 746 F. 2d 51 (1984) there are exceptions to the general rule that only parties to an action may appeal its outcome. An appellant must be "privy to the record" below and must be aggrieved by the order appealed from. There is no question here that D.C.N.A. was privy to the record. It was a party for six of the seven months this matter was pending. Its removal as a party was equivocal, and was the last record entry before the judgment appealed from. The only question is, then, whether D.C.N.A. was "aggrieved" directly and sufficiently to bring it within the exceptions noted by the Court in *LTV Corp.*, supra. It was so aggrieved.

In *Adams v. Morton*, 581 F. 2d 1314 (9th Cir., 1978) an Indian Tribe never entered as a party in a suit by some of its members against the U.S. Secretary of the Interior. The tribe was, however, permitted to appeal, largely on grounds that it had participated by filing papers and presenting argument in the lawsuit and would be clearly affected by the outcome. Here, similarly,

D.C.N.A.'s members who are and are not named parties to the lawsuit will be bound by its outcome: that nurses employed by the District of Columbia are exempt from the maximum hours provision of F.L.S.A. In addition, D.C.N.A. itself, in fashioning and enforcing its collective bargaining agreement with the District, must account for overtime pay. The contractual pay schedule, for example, was negotiated by D.C.N.A. in contemplation of overtime payments under FLSA. If they are unavailable, this changes the overall value of the compensation structure established by D.C.N.A. and the District in a contract which D.C.N.A. is a party. Specific overtime, weekend work and on-call/call-back provisions of the collective bargaining agreement are directly affected if FLSA does not apply to nurses. (Affidavit of Freeman-Owen, Exhibit 1, pp. 8-9, Attachment 5 (hereto). As a consequence, D.C.N.A. is clearly "aggrieved" by the holding of the lower court that nurses covered by the contract are exempt professionals under FLSA.

CONCLUSION

For all the foregoing reasons, the Appeal should be allowed, and individual plaintiffs below added as appellants.

Respectfully Submitted,

DISTRICT OF COLUMBIA NURSES ASSOCIATION AND

THELMA BATTLE, *et. al.*, PLAINTIFFS

July 22, 1988

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